INDEX

CITATIONS

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 869

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

ECONOMY CAB COMPANY OF JACKSONVILLE AND THRIFT CABS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issued to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the District Court (R. 254-261) is not reported. The opinion of the Court of Appeals (R. 270-271) has not yet been reported. See also opinion in *Fahs* v. *New Deal Cab Co.,* No. 870 (R. 286-290).

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1949. (R. 271.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether respondent's taxicab drivers in the years 1942 through 1945 were respondent's employees and their earnings thus wages subject to the social security taxes imposed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act contained in the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pp. 17-21.

STATEMENT

This case was commenced as two suits for the recovery of social security taxes collected from the Economy Cab Company of Jacksonville under the Federal Insurance Contributions Act for the quarters ending June 30, 1942, through December 31, 1945, in the amount of $2,998.02; under the Federal Unemployment Tax Act for the calendar years 1942 through 1945, in the amount of $1,164.26; and taxes collected from Thrift Cabs, Inc., under the same Acts and for the same period in the amounts of $2,579.78 and $1,026.04, respectively. (R. 255-256.) The two suits were consolidated for trial, in which the single issue was whether the drivers who operated taxis owned by the companies were employees of those companies for social security purposes. (R. 254-255.) The District Court held that they were. (R. 254-261.) The Court of Appeals for the Fifth Circuit held that

they were not and reversed the District Court. (R. 270-271.)

The District Court made detailed findings of fact (R. 255-261). The findings (apart from the conclusion) seem to have been accepted by the Court of Appeals without question. The facts, substantially as found by the District Court, are as follows:

During the period in question the Economy Cab Company and Thrift Cabs, Inc., were under the same ownership and management. The companies were operated from the same location, used the same facilities and followed the same methods and practices. All cabs were painted the same distinctive design and colors. They bore the company name and phone and identifying numbers. Except that one group bore the name Economy and the other Thrift, the appearance of the cabs was substantially identical. For all practical purposes the two companies were a single business operating approximately 100 cabs. (R. 256.)

The business of the two companies (hereinafter for convenience referred to as the "company") is operated under two licenses issued by the City of Jacksonville each of which permits the operation of fifty cabs for hire. No cab may be operated in Jacksonville without a permit and such permits are issued only upon showing of necessity. Approximately thirty employees, exclusive of cab drivers, are employed by the company in its office, garage and body repair shop. The company has a capital

investment of about $50,000 in cabs and other facilities necessary to the conduct of the business. (R. 256.)

The public liability insurance covering the operation of the cabs is carried by the company and, except for a nominal liability in case of negligence, the cab driver is not responsible for any damage done to a company cab. Such losses are borne by the company. The nominal liability which may be asserted against a driver is governed by the union contract between the company and the drivers' union. (R. 256.)

The cabs are not equipped with meters but are operated on a system of zone rates. A passenger may elect to hire the cab as a private cab without other passengers for which he must pay 50 cents in the first zone. He also may elect to share the cab with others and the rate to him is then 10 cents in the first zone. (R. 257.)

The zone rates are set by agreement between the company and the drivers' union. The portion which the company received as its share of the income of the cab is a fixed amount per shift. The cabs are operated two shifts a day, with a day driver and a night driver. The company's income from this source is approximately $900 a day. Under the contract (R. 236) all gasoline used in the cabs is required to be purchased from the company; the price is to be two cents under the prevailing retail price, but not less than 3 cents over the cost to the company. The amount of gasoline used is in the

neighborhood of one-half million gallons a year. (R. 257.)

Besides maintaining facilities for gassing and servicing its cabs, the company operates a garage and a body shop for keeping the cabs in repair and running order. (R. 257.)

The cabs carry no identification marks of any kind, except those of the company, and each cab carries attached to the luggage compartment a display advertisement for which the company is paid by an advertising company which rents the display space. No part of this revenue goes to the drivers. (R. 257.) The company has concessions at two bus terminals which give it the exclusive right to supply cabs to prospective passengers at those locations. (R. 257.)

The company maintains a central switchboard for calls from the public seeking cabs, and a series of call boxes located in different parts of the city for use by the drivers in calling in to the company under its rules for reporting. (R. 257.)

The company carries display advertisements in the telephone book, and advertises regularly in the newspapers for dependable drivers when it has openings to be filled. (R. 258.) When a prospective driver applies to the company seeking to drive one of its cabs he is required to furnish three letters of reference. If he is considered satisfactory he is sent, together with his letters, to the City Cab Inspector for examination and the issuance of a cab driver's permit. When given his driver's per-

mit the company assigns him a cab and a shift, and he is required to put up a $10 bond to guarantee payment of the so-called "rental" on the cab. He is also required to purchase a chauffeur's cap, supplied by the company, and a company badge. All together he has an investment of about $15. (R. 258.)

During the period in question, when a driver was taken on by the company he had to apply to the drivers' union for membership under the closed shop union contract between the company and the union. (R. 258.)

If no cab is available when he is accepted by the company he is put on the "extra board", and he is permitted to drive such cabs as may be available from regular drivers who, because of sickness or other reasons, temporarily are not driving. This continues until a cab becomes available for a regular assignment. (R. 258.) When a driver receives a regular assignment he uses the same cab every day. Cabs are assigned on a seniority basis, that is, when a new cab is received a driver is permitted to "bid" on the cab if he desires. The driver with the greatest seniority among the bidders is entitled to drive the cab on his shift. He is then ineligible to bid on another cab for a period of six months. (R. 258.)

While a driver is operating a cab he is subject to the direction of the company as to his conduct so far as the nature of an unmetered cab business will permit. The company gives him general in-

structions when he is first engaged, and from time to time further instructions are posted on the company's bulletin board. Company supervisors cruise the city and observe infractions of the rules. Company rules require that the drivers call the office at least every sixty minutes, although the rule is not always observed. Failure to observe the rules, or to conform to the company's ideas of proper conduct, results in the imposition of penalties. These penalties may consist of "parking" the driver for a part of a shift or a suspension for a day or more, depending upon the breach of conduct involved. (R. 259.)

If a driver wishes a day off he must notify the company forty-eight hours in advance. In case of sickness the driver must report to the company three hours in advance of a shift, and, if the company is not satisfied with his explanation, an inspector checks in person to ascertain the truth of the driver's representation. (R. 259.)

Drivers are required to wear a chauffeur's cap, company badge and shirts and ties of restrained color. Cab rates are enforced by the company, and in cases of overcharge the drivers may be required to make a refund to the passenger. Loaders are stationed at certain cab stands who direct the loading of passengers into the cabs. The drivers are required to make calls at certain stands in an effort to build up the business of that stand. The drivers are not permitted by company instructions to carry non-paying passengers. (R. 259.)

None of the drivers holds a permit or license from the city authorities to operate a taxicab for hire, although they are required to, and do, hold a driver's permit. Neither do they have a business privilege or occupational license. (R. 259.)

The drivers work regularly, with the term of the relationship between them and the company averaging several years. These drivers have no other business or means of livelihood. They do not advertise or hold themselves out as independent taxicab operators by telephone listings or otherwise. If their relationship with the company should be terminated they would be unemployed in the ordinary sense of that word. (R. 260.)

The cabs are furnished under the guise of an oral lease, but the company cannot refuse to furnish a cab to a driver without proper cause and procedure. The general terms of the employment relationship are covered by a contract between the company and the drivers' union, a local affiliated with the American Federation of Labor. (R. 260, 234-244.)

The drivers' remuneration is controlled by the terms of the contract between the company and the union, and consists of the excess of fares over the cost of gasoline and oil and a fixed amount per shift representing the company's share of the cabs' earnings. (R. 260.) The earnings of the drivers are relatively small, amounting to no more than ordinary wages. (R. 260.) The work of the drivers requires no peculiar skill not possessed by any

capable automobile or truck driver. (R. 260.) Except for the fact that a driver's remuneration for his labor may be greater or less from day to day, depending upon the varying public demand for cab service, the employment of the drivers affords no opportunity for profit or loss. (R. 260.)

Besides a $10 bond posted with the company and the value of a chauffeur's cap, shirts, ties and badge required by company rules, the drivers have no investment in facilities. (R. 260.)

The operation of the cabs by the cab drivers constitutes a part of an integrated economic unit devoted to the furnishing of cab service to the public of Jacksonville. (R. 261.)

Considering the nature of the business, the degree of control exercised by the company was substantially the same as would be expected if the drivers had been admitted employees. (R. 261.)

The drivers were, as a matter of economic reality, dependent upon the company's business as their sole means of livelihood. (R. 261.)

On the basis of the above facts, the District Court concluded that the drivers were employees of the respondent companies. This decision, announced prior to the amendatory Act of June 14, 1948, discussed *infra*, pp. 13-14, stated that the case was controlled by the principles announced by the Supreme Court in *United States* v. *Silk*, 331 U. S. 704, and other cases, but that "in the present case, because of the control exercised by the plaintiffs over the

drivers' services, the same results would be reached if common-law rules were applied" (R. 255).

The Court of Appeals reversed on the ground that the 1948 amendment reestablishing the common-law rules required a different result.[1]

REASONS FOR GRANTING THE WRIT

This case involves the status of taxicab drivers as employees for social security purposes. Here, as in *New Deal Cab Co.* v. *Fahs*, also decided by the court below on May 3, 1949, and *Party Cab Co.* v. *United States*, 172 F. 2d 87 (C.A. 7), in both of which we are petitioning for writs of certiorari (Nos. 870 and 871), the cabs were owned by a fleet operator who had the license to engage in the taxicab business, and the drivers "rented" the cabs, retaining as their earnings the excess of the fares collected over the cost of gasoline, or gasoline and oil, and a fixed amount per shift paid to the taxicab company. The facts of the three cases vary only in minor detail from each other and also from other cases[2] in which the application of the common-law test of "employee" has resulted in holdings that cab drivers are not employees. On the other hand, all three cases are also substantially similar in their facts to *Jones* v.

---

[1] See opinion of the court below in the companion case of *New Deal Cab Co.* v. *Fahs*, No. 870, in which a petition for certiorari is also being filed.

[2] *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C.A. 4); *United States* v. *Davis*, 154 F. 2d 314 (C.A.D.C.), discussed briefly in our petition for certiorari in *United States* v. *Party Cab Co.*, *supra*. *Woods* v. *Nicholas*, 163 F. 2d 615 (C.A. 10), another case, is clearly distinguishable.

Goodson, 121 F. 2d 176 (C.A. 10), in which the application of the common-law test of "employee" resulted in a holding that cab drivers were employees.

The facts of the present case in particular are so close to those of *Jones* v. *Goodson* that we believe the cases to be indistinguishable, and the decision below therefore to be in direct conflict with, the decision in that case.[3] Even aside from the conflict, it is important that this Court furnish a guide for the application of the common-law test of an "employee" to cab drivers by determining whether differences in minor details are decisive and, if so, with what result. A number of cases involving the status of cab drivers for social security purposes are now pending in District Courts, and the Bureau of Internal Revenue has advised us that its rulings as to the status of cab drivers affect about 136,000 drivers.

The conflict between the decision below and *Jones* v. *Goodson* is readily apparent. In both cases the cab drivers drove cabs owned by a company which was in the taxicab business,[4] operated the cabs under its own name and insignia, charged zone rates, maintained facilities for the conduct of the business, and bore all expenses except gasoline and oil; the drivers were represented by a local

---

[3] *New Deal Cab Co.* v. *Fahs, supra,* also appears to be in conflict with *Jones* v. *Goodson, supra.*

[4] *Jones* v. *Goodson,* also involved drivers who owned their own cabs. They too were held to be employees.

A. F. of L. union and covered by a union contract with the company which, among other things, controlled the drivers' remuneration by setting the amount of the "lease" payment per shift for a cab and in the present case by also setting the zone rates; the company required the drivers to purchase their gasoline from the company and had rules which the drivers were required to observe; and the company required the drivers to phone in to the main office hourly and to accept calls or make calls at certain stands. In *Jones* v. *Goodson*, a driver could be suspended or dismissed by the company for failure to observe the company's rules, a bad accident record, lack of courtesy to the public or action injurious to the company's reputation. In the instant case failure to observe the company's regulations or to conform to the company's ideas of proper conduct resulted in the imposition of penalties, which could consist of "parking" a driver for a part of a shift or a suspension for a day or more, depending upon the breach of conduct involved. In the present case, in addition, the drivers were also required to wear a chauffeur's cap, company badge, and shirts and ties of restrained color; the drivers were not permitted by the company instructions to carry non-paying passengers; company supervisors cruised the city to observe infractions of the company's rules; and a driver was required to notify the company in advance of a shift in case of sickness or if he wished a day off. These factors more

than compensate for the facts, referred to by respondents below, that in *Jones* v. *Goodson*, the drivers were required to remain within the city limits and to pay an additional amount for mileage over a specific maximum per shift, and that the company had the option, apparently unused, to require that the fares collected be divided on a percentage basis.

In *Jones* v. *Goodson*, the Court of Appeals for the Tenth Circuit stated, we believe entirely correctly, that the company's rights of direction and control constituted a substantial degree of authoritative control over the method and manner of conducting the business, not solely as to the results to be accomplished, and that an appropriate application of the common-law test of employment leads to the conclusion that the relationship between the company and drivers was that of employer and employee. In contrast, the court below held that the instant drivers were not the company's employees. We see no reasonable basis for distinguishing the two cases. This case even more strongly reflects an employer-employee relationship than does *Jones* v. *Goodson*.

The opinions below do not refer to *Jones* v. *Goodson*, but the Seventh Circuit in the *Party Cab* case sought to distinguish it on the ground that it antedated the 1948 amendment to Section 1101(a)(6) of the Social Security Act (Pub. Law 642, 80th Cong., 2d Sess., enacted June 14, 1948, *infra*, p. 18), which requires use of "the usual

common law rules" in determining the existence of the employment relationship. But the opinion in *Jones* v. *Goodson* plainly demonstrates that the court was applying the common-law test and nothing else. And the administrative regulation then in effect, and quoted and applied by the court, is almost identical with that in effect at the present time (*infra*, pp. 20-21), quoted by the court below in *New Deal Cab Co.* case.

Respondent argued below that subsequent cases had impaired the authority of *Jones* v. *Goodson*. But those cases were sufficiently distinguishable so that it could not be said that there was any direct conflict. In *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C.A. 4), the District Court opinion (49 F. Supp. 605, 609) shows that the drivers were operating their cabs under an agreement whereby their daily payments would be credited against the purchase price, and under which they were required to maintain the cabs at their own expense; thus in substance, they had an ownership interest in the cabs they drove. In *United States* v. *Davis*, 154 F. 2d 314 (C.A.D.C.), the owner and lessor of the cab claimed to be the employer was not the operator of the taxicab company but merely one of the members of a cooperative association; the association was the equivalent of the operating company involved in the other cases. In *Woods* v. *Nicholas*, 163 F. 2d 615 (C.A. 10), the drivers were equitable owners of their cabs and jointly formulated policies and promulgated rules and regulations. Drivers

owning their cabs are similar to the truck drivers held not to be employees in *United States* v. *Silk* and *Harrison* v. *Greyvan Line,* 331 U. S. 704. In each of the cases, *Jones* v. *Goodson* was found to be distinguishable. But no attempt to distinguish the case was made by the court below in the cases at bar.

A comparison of the decision below with the *Party Cab Co.* decision, *supra,* also illustrates the present need for a decision by this Court relative to the application of the common-law test of "employee" to cab drivers. In the *Party Cab Co.* case the Seventh Circuit stated that the control which is material is that which the company exercises over the drivers during the period they are in possession of the cabs; the holding that the drivers were not employees was based partly, if not principally, upon the conclusion that the cab company exercised little, if any, such control. In the present case the cab company did exercise such control by, for example, requiring the drivers to call the main office hourly and to pick up passengers at particular cab stands. While we do not believe the extent to which a cab company imposes requirements on its drivers during the operation of the cabs is controlling in the application of the common-law test of an "employee", the fact remains that the application of the test by the court below is even inconsistent with the view taken by the Seventh Circuit in the *Party Cab Co.* case as to the component element of control. Thus, the decision below adds even more

confusion to what the Seventh Circuit stated in the *Party Cab Co.* case was already a "perplexing problem". (172 F. 2d at 88.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP PERLMAN,
Solicitor General.

JUNE, 1949.

APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

["Federal Insurance Contributions Act"]

SEC. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426(b)) after such date:

* * * * *

(26 U. S. C. 1410.)

SEC. 1426 (as amended by Sec. 606, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360.) DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash;

* * * * *

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service,

of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *

* * * * *

(d) (as amended by Sec. 1, Public Law 642, 80th Cong., 2d Sess.). *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

(26 U.S.C. 1426.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

["Federal Unemployment Tax Act"]

SEC. 1600 (as amended by Sec. 608, Social Security Act Amendments of 1939, *supra*). RATE OF TAX

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ; equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.

(26 U.S.C. 1600.)

SEC. 1607 (as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*). DEFINITIONS.

When used in this subchapter—

* * * * *

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * *

* * * * *

(i) (as amended by Sec. 1, Pub. Law 642, 80th Cong., 2d Sess., *supra*). *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * *

(26 U.S.C. 1607.)

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

> SEC. 402.204. WHO ARE EMPLOYEES.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * *

The provisions of Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, are substantially the same as the provisions of Section 402.204 of Treasury Regulations 106.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 662948 704

In The Supreme Court of The United States

October Term, 1948

NO. 369 123

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

Petitioner

versus

ECONOMY CAB COMPANY OF JACKSONVILLE, and THRIFT CABS, INC.

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. D. TOWERS
TAYLOR JONES
500 Consolidated Building,
Jacksonville, Florida

Attorneys for Respondents

DREW JACKSONVILLE 712937

INDEX

TABLE OF CASES

TABLE OF CASES

STATUTES

Internal Revenue Code

TREASURY REGULATIONS

In The Supreme Court of The United States

October Term, 1948

NO. 869

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

Petitioner

versus

ECONOMY CAB COMPANY OF JACKSONVILLE, and THRIFT CABS, INC.

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

A. The Facts

Economy Cab Company of Jacksonville and Thrift Cabs, Inc., brought separate actions against the Collector of Internal Revenue to recover social security taxes paid by the taxicab companies to the defendant under the Federal Insurance Contributions Act, 26 U.S.C. Sec. 1410, et seq. (*infra*, p. 17) and the Federal Unemployment Tax Act, 26 U.S.C. Sec. 1600, et seq. (*infra*, p. 18) with respect to the taxicab drivers (R. 1, 6). The two actions were consolidated for trial (R. 13) and for appeal and further proceedings (R. 263, 264).

Economy Cab Company of Jacksonville is a Florida Corporation which was organized in 1932 and Thrift Cabs, Inc., is a Florida Corporation which was organized in 1933 (R. 1, 6, 31). Since organization these companies have been furnishing a taxicab service in the City of Jacksonville and its environs under authority of city ordinances and certificates of public convenience and necessity (R. 31, 246-250).

The method of the operations is, briefly, as follows: Each company is the owner of approximately fifty five-passenger automobiles which are painted in the color design adopted by each company and bear the name of the company and its telephone number (R. 21, 22, 84, 85). These automobiles are rented or leased to individual drivers for a ten hour shift and operated by the drivers in the City of Jacksonville and surrounding territory as cruising taxicabs (R. 22, 23, 26). The companies furnish the drivers a taxicab which is in good condition, maintain and repair the cab and rent or lease the vehicle to the driver for a day shift or a night shift (R. 22, 46, 50). The driver calls for the automobile at the company garage, pays the company a stipulated rental for a ten hour period and takes complete control of the vehicle for a rental period. (R. 21-23, 29, 46-50, 60-64).

The companies pay the drivers no salary, wage or compensation of any nature whatsoever (R. 23, 50, 51, 65). The drivers operate the automobiles in Jacksonville and vicinity as cruising taxicabs without control or direction from the companies (R. 23, 28, 47-49, 61-63). The drivers collect and pocket their own fares (R. 30, 50, 65, 157), drive wherever they choose whenever they choose and carry passengers of their own choice and selection (R. 27, 28, 49, 61, 62). The companies do not and cannot require the drivers to operate in any particular section of the city or to carry

any particular passengers (R. 26, 47, 48, 61-63, 189, 190). The drivers can and frequently do decline to accept passengers if the trip is not considered profitable or desirable (R. 25, 48, 62). A passenger may engage a cab as a private cab by agreement with the driver for a single trip or for an extended length of time or the driver may choose to carry several passengers to their various destinations on one trip (R. 28, 49, 61-63, 169, 170, 189, 190, 202). All fares are collected and retained by the driver (R. 30, 65, 124, 157).

The rates charged by the drivers are fixed by agreement between the drivers and the companies and are based upon a "zone" system (R. 28, 29). The companies have no control over the earnings of the drivers and have no interest in the earnings of the drivers, the earnings of the drivers being determined solely by the initiative, alertness and diligence of the drivers in procuring passengers and transporting them to their destinations (R. 30, 31, 105, 106, 221).

The companies maintain an office with a switchboard for receiving calls and also maintain ten call boxes scattered throughout the city. When a call is received from a prospective passenger it is offered to the driver nearest the passenger's location when the driver calls the company office. The driver is free to accept it or reject it and frequently calls are declined by drivers in which event the call is offered to another driver (R. 25, 55, 56).

The drivers are not restricted in their operations to the city of Jacksonville or to the County of Duval but may and frequently do transport passengers to other cities in the state or even to other states. The decision to accept or refuse such trips rests exclusively with the driver and the fare collected is exclusively his (R. 23-25, 47, 48, 62, 63).

The companies have never operated their business upon any basis other than leasing or renting the cabs to the drivers and this has been the procedure from the inception of the business. The companies have never shared in the earnings of the drivers nor have the drivers ever shared in the earnings of the companies; and the companies have never received any percentage of the fares collected by the drivers nor do the companies reserve any right to do so. (R. 30, 31, 37, 50, 51, 75, 157, 184).

The drivers are not required to operate the vehicles as taxicabs; they can and do check the cabs in when they desire and also use them for their personal pleasure and convenience (R. 29, 30, 46, 50, 66, 196). If a driver is arrested for a violation of traffic laws, the companies do not pay his fine or furnish him representation. The driver procures this for himself (R. 29, 50, 51). At times the companies attempted to prevail on the drivers to wear appropriate shirts and caps and to check in over the telephone at intervals but these efforts were unsuccessful because of lack of control over the drivers (R. 225, 226).

There is a contract between the companies and the drivers' union which serves as a master contract for the leasing of the cabs. (R. 43-45, 234-245) The companies advertise a taxicab service, furnish switchboard service, a starter at the bus station and provide liability insurance for the cabs; these are services the drivers pay for and expect to obtain when they lease the cabs. (R. 152, 160, 188, 189).

B. Questions Involved

The only questions involved in this case are: (1) whether the drivers of the taxicabs are "employees" of the companies within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act;

and (2) whether any "wages" were paid by the companies to the drivers within the meaning of those Acts.

C. Ruling Of The Courts Below

The District Judge applied the "economic reality" theory of *United States* v. *Silk*, 331 U.S. 704, 91 L. Ed. 1757, and held that the drivers were "employees" of the taxicab companies within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and that the earnings of the drivers constituted "wages". (R. 254-261) Judgment was entered for the defendant in each case (R. 262).

Upon appeal the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court upon the ground that the Act of Congress known as the Social Security Amendment (Pub. Law 642, 80th Cong., 2nd Sess., enacted June 14, 1948, *infra*, p. 19) required the application of common-law rules in the determination of whether the drivers were employees (174 Fed. 2d 319) and concluded that "Applying the common law rules as commanded by the recent legislation, it cannot be held that these drivers are employees and that the money they earn is wages." (174 Fed. 2d 321) *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318 and *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321.

ARGUMENT

Petitioner asks that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on two grounds: (1) that the decision in this case is claimed to be in conflict with the decision in the case of *Jones* v. *Goodson*, 121 Fed. 2d. 176 (C. A. 10); and (2) that this Court should furnish a guide for the application of the common law control test

in determining whether taxicab drivers are employees and the significance to be attached to differences in facts. (Pet. 11)

Respondents contend that no basis for granting the Petition for Certiorari exists and urges the denial of the Petition for the reasons assigned below.

THERE IS NO CONFLICT IN DECISIONS

The burden of Petitioner's argument is that upon the facts of this case, the Court below reached an erroneous conclusion but error is not shown. Petitioner admits that the proper and correct principles of law were applied by the Court of Appeals in the decision of the case, but complains of the result. In an effort to persuade this Court to review the case the Petitioner states that the decision in the case at bar is in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Jones* v. *Goodson*, 121 Fed. 2d 176.

This assertion is unsupportable. The two cases are not in conflict; they were decided on different factual situations. If any conflict in the cases exists, it is a conflict in the facts and not a conflict in the decisions. Each case in which the question arises of whether certain persons or groups of persons come within the designation of "employees" must necessarily rest upon its own facts. The facts in *Jones* v. *Goodson* impelled the Court to conclude that the taxicab drivers there in question were employees, while a different set of facts in the case at bar led the Court to conclude that taxicab drivers here concerned were not employees. This result was reached because different facts and a different relationship existed in the two cases.

It is not necessary to review in detail the facts in each of the cases but certain important variations in the two

cases may be readily observed. In *Jones* v. *Goodson*, the taxicab company exercised continuous and extensive control over the drivers and imposed numerous restrictions upon the operations of the taxicabs. The company limited the sphere and scope of the drivers' operations and prescribed a maximum mileage which the cabs should be driven. The taxicab company also reserved the right to operate the cabs on a percentage basis and to require a division of fares with the company. The drivers were prohibited from using the vehicles for any purpose other than the conduct of the taxicab business. Upon such facts the drivers were held to be employees of the Company. The Court found that the company exercised and had the right to exercise constant and continuous control not only as to the result to be accomplished by the work of the drivers but also as to the details and means by which that result was to be accomplished. Upon the application of the common law control test, the Tenth Circuit decided that the drivers were employees.

In the present case, however, and in the cases of *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318, and *Party Cab Co.* v. *United States*, 172 Fed. 2d 87, the above mentioned elements of continuous control and supervision are not present; an entirely different factual situation exists. As stated by the Court of Appeals for the Fifth Circuit in referring to the drivers in the instant case and in the *New Deal* case:

> "He was under no control by the Company and had no instructions as to where he should seek patrons, what he should charge them, or what he should do with the car. He could use it for his own purpose, for a trip, or even to go fishing." (174 Fed. 2d 320)

With respect to the almost complete absence of control exercised by the company over the drivers in the *Party*

Cab Company case, the Court of Appeals for the Seventh Circuit said:

> "During this so-called period of employment the plaintiff had no control over the area of operation of the number of miles which the cab was to be operated. It could not require the drivers to accept a call for a taxi received by it, to telephone the office or report his whereabouts and could not require a driver to purchase gasoline or oil from it, or to account for fares collected or for tips or gratuities received. In fact, it appears that a driver had the same freedom as to the manner and means to be employed in the operation of a taxicab as would be possessed by any other car owner or driver." (172 Fed. 2d 92, 93)

Hence, the facts in the case of *Jones* v. *Goodson* are materially and substantially different from the facts in the instant case and in the *New Deal* and *Party Cab Co.* cases. The Courts concluded that substantial control was exercised over the drivers in the one case, while practically no control existed in the other cases. We reiterate that any conflict in the cases is a conflict in the facts and not a conflict in the decisions.

It has been repeatedly recognized that *Jones* v. *Goodson* must be distinguished on its facts from cases such as the present case. No quarrel or dissent has been found or expressed on the law announced by the Court in *Jones* v. *Goodson*, but the case has been repeatedly distinguished on its facts. *Jones* v. *Goodson* was distinguished on its facts by the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Yellow Cab Co.*, 141 Fed. 2d 324; it was distinguished upon its facts by the Court of Appeals for the District of Columbia in *United States* v. *Davis*, 154 Fed. 2d 314; and recently, in the case of *Woods* v. *Nicholas*, 163 Fed. 2d 615, it was distinguished on its facts by the very court which rendered the decision in *Jones* v. *Goodson*.

Far from a conflict in decisions existing, the decisions are uniform and in substantial agreement with respect to the determination of whether taxicab drivers are employees. Where no control over the drivers exists, where the drivers rent or lease vehicles and conduct their business wherever they choose, use the vehicles for such purposes as they desire, having complete freedom of action without any obligation to account to the company for funds received and monies collected, the drivers are held not to be employees. *Magruder* v. *Yellow Cab Co.*, 141 Fed. 2d 324 (C. A. 4), *United States* v. *Davis*, 154 Fed. 2d 314 (C. A. D. C.), *Woods* v. *Nicholas*, 163 Fed. 2d 615 (C. A. 10), *Party Cab Co.* v. *United States*, 172 Fed. 2d 87 (C. A. 7), *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318 (C. A. 5), *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321 (C. A. 5). But where the company asserts strict supervision over the drivers, controls their policies and action, limits their mileage, restricts the sphere of their operations, forbids the use of the cabs for any purpose other than taxicabs, requires the constant operation of the cabs and has a right to operate the cabs on a percentage basis and to require a division of the fares with the company, such drivers are held to be employees. *Jones* v. *Goodson*, 121 Fed. 2d 176 (C. A. 10).

Petitioner's claim that there is a conflict in decisions between *Jones* v. *Goodson* and the instant case is without merit. The plain truth is that the facts in the two cases are in material variance. Certiorari is not granted where the asserted conflict in decisions is a conflict in the facts rather than a conflict in the pronouncement and application of principles of law. In *Wisconsin Electric Company* v. *Dumore Company*, 282 U.S. 813, 75 L. Ed. 728, this Court said:

> "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

An examination of the opinion of the Tenth Circuit Court of Appeals in *Jones* v. *Goodson*, 121 Fed. 2d 176, and an examination of the opinions of the Fifth Circuit Court of Appeals in *New Deal Cab Co.* v. *Fahs*, 174 Fed. 2d 318, and *Economy Cab Co.* v. *Fahs*, 174 Fed. 2d 321, reveals that the two Circuits reached different conclusions upon substantially different facts.

NO IMPORTANT QUESTION OF LAW IS PRESENTED

There is no controversy in this case with respect to legal principles. The same principles of law were applied by the Court of Appeals for the Tenth Circuit in *Jones* v. *Goodson* as were applied by the Court of Appeals for the Fifth Circuit in the present case and in the case of *New Deal Cab Co.* v. *Fahs*, and by the Court of Appeals for the Seventh Circuit in *Party Cab Co.* v. *United States*. The Tenth Circuit, the Fifth Circuit and the Seventh Circuit applied the common law control test in deciding whether the persons in question were employees within the meaning of the Social Security Legislation. This was undoubtedly correct. Petitioner does not contend otherwise.

This Court was recently of the opinion that standards other than those recognized by the common law rules should be applied in the determination of employees under Social Security Legislation. *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U. S. 704, 91 L. Ed. 1757. But Congress, after the decision in the above cases, expressed its explicit intention and direction that common law rules were

to be applied in the determination of employees from the date of the initial adoption of the Social Security Act. (Social Security Amendment, Pub. Law 642, 80th Cong. 2nd Sess., enacted June 14, 1948, *infra*, p. 19.)

The Treasury Regulations (Reg. 106, Sec. 402.204 and Reg. 107, Sec. 403.204, *infra*, p. 19-21) stating the elements of the common law control test for use in determining whether the taxicab drivers were employees were recognized and applied by the Courts in *Jones* v. *Goodson*, in the *New Deal* case, in the *Party Cab Co.* case and in the instant case. The principles of law which must be applied in reaching a decision in such cases are clear; these principles of law were recognized and applied by the Court below and also by the Court of Appeals for the Seventh Circuit in *Party Cab Co.* v. *United States* and by the Court of Appeals for the Tenth Circuit in *Jones* v. *Goodson*. There is no question of law either important or unimportant which is in doubt in this case, nor are there any conflicting enunciations of law in any of these cases which should or could be settled by granting certiorari.

When this Court in the year 1946, granted certiorari in other cases to review decisions that certain persons were not "employees" within the meaning of the Social Security Act it was for the purpose of deciding the applicable standards for the determination of employees under the Act. "Writs of Certiorari were granted—because of the general importance in the collection of social security taxes of deciding what are the applicable standards for the determination of employees under the Act." *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U.S. 704, 91 L. Ed. 1757. But Congress has now by the Social Security Amendment positively and definitely prescribed the "applicable standards for the determination of employees un-

der the Act." Those applicable standards are not in doubt; they are the common law rules which have been properly and accurately stated in the Treasury Regulations.

Consequently, the principles of law applicable to this and similar cases have been definitely and finally announced by Congress and fully and fairly stated in the Treasury Regulations. These principles of law have been properly and fairly applied by the Court below. They are known to the bench, bar and public. There are no important principles of law which can be decided by this Court in this case if certiorari should be granted.

PETITIONER ASKS MERELY TO HAVE THIS COURT REVIEW THE EVIDENCE AND RE-EXAMINE THE FACTS. CERTIORARI WILL NOT BE GRANTED FOR THIS PURPOSE

Cases in which the question of whether certain individuals or groups of persons are employees is raised differ in their facts. The decision in each case must necessarily rest upon the particular facts of that particular case. That is true in the instant case. Upon the facts of this case, the Court below found the drivers not to be employees. If certiorari should be granted in this case, this Court could not resolve any conflict in decisions because as, has heretofore been shown, there is no conflict in the pronouncement or application of principles of law among the cases; the asserted conflict arises from differences in states of fact.

Neither can the granting of certiorari serve to settle any important principle of law. The correct principles of law were applied by the Court below in the decision of this case; the common law rules were applied. These were admittedly the proper rules of law to be applied to this case and the same rules of law must be applied to every other

case arising under the Social Security Act for the determination of employees under the Act. The statement of the common law rules governing the existence or non-existence of an employer-employee relationship is fully and accurately stated in the Treasury Regulations (*infra*, p. 19-21). The statement of the governing principles found in the Treasury Regulations was quoted, approved, adopted and applied by the Court of Appeals for the Fifth Circuit in this case with the remark "This is an excellent statement of the legal relations mentioned." (174 Fed. 2d 319) So the principles of law applicable to cases raising the question of the existence of an employer-employee relationship are settled, plain, clear and explicit. No principle of law needs settling in this case.

But Petitioner asks this Court to take jurisdiction for the purpose of furnishing "a guide for the application of the common law test of an 'employee' to cab drivers" by determining the effect of differences in factual details. The utter impossibility of this Court furnishing any such "guide" is apparent. In effect, the Petitioner asks this Court to place a value, a significance, an appraisal upon each factual detail. A case such as this is the end product of a large accumulation of facts; but each case presents different facts and varying combinations of facts, circumstances and conditions. If this Court should undertake the laborious and impractical task of picking out each fact in the case, weighing it, classifying it, evaluating it and tagging it with some degree of significance, relevancy or importance, a "guide" such as Petitioner asks this Court to furnish for the application of the common law test would still not be created. The next case to arise involving the question of whether another group of persons are employees would inevitably present new and different facts and a different combination of facts. Would Petitioner

then again and again ask this Court to review each case until all possible facts and all combinations of facts had been presented for evaluation, classification and appraisal? This Court cannot spend its life in reviewing and weighing facts and evidence.

Regardless of the efforts of Petitioner to depict adroitly a picture of a conflict in decisions, nothing more than a superficial reading of the Petition for Certiorari in this case and in the case of *New Deal Cab Co.* v. *Fahs* and *Party Cab Co.* v. *United States* (in which certiorari has also been applied for) is needed to demonstrate that Petitioner's real complaint asserted in the Petition is that the present case and the other two cases in which certiorari has been applied for were erroneously decided on the facts.

It is generally understood by the Bar and by the public that under Supreme Court Rule No. 38, this Court will not grant certiorari simply because Petitioner contends that the Court below erred in the result reached on the particular facts of the case. The Supreme Court does not grant certiorari in cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result. *Deputy* v. *duPont*, 308 U.S. 488, 84 L. Ed. 416 (dissent). It has long been the rule in this Court that certiorari is not awarded to review evidence or to examine facts. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 82 L. Ed. 1273; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413. In *United States of America* v. *Johnston*, 268 U.S. 220, 69 L. Ed. 925, this Court speaking through Mr. Justice Holmes said: "We do not grant certiorari to review evidence and discuss specific facts."

Necessarily, the decision in this case can have but slight if any bearing upon proper decision of any other case. Each

case in which the question arises of whether a particular person or group of persons comes within the designation "employee" must, perforce, be determined upon the peculiar facts of that case and the variation in facts and circumstances pertaining to the thousands of relationships, all different in degree, is legion. If certiorari should be granted in this case this Court could only announce the principles of law to be applied in arriving at a determination of whether a person is an employee under the Social Security Act in any of the many thousands of varying situations. But there is no necessity for this Court announcing the principles to be applied. The Congress has already done this.

Petitioner asks this Court to review the evidence, weigh the facts, evaluate the testimony and to overthrow the conclusion of the Court below. This case has no especial significance to the bench, to the bar or to the public. Admittedly, correct principles of law were applied in the decision of this case. This Court does not and cannot review the correctness of the result in each case decided by Courts of Appeal in the several Circuits.

CONCLUSION

There is no conflict in decisions. No important principle of law is presented for determination. The review of this case by this Court cannot possibly furnish a guide for the decision of other cases. Certiorari is not and should not be granted to review the evidence and to discuss specific facts. Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. D. TOWERS
TAYLOR JONES
500 Consolidated Building,
Jacksonville, Florida

Attorneys for Respondents

July, 1949.

APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

("Federal Insurance Contributions Act")

Sec. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in Section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in Section 1426 (b)) after such date:

* * * * * * * * * * *

(26 U. S. C. 1410.)

SEC. 1426 (as amended by Sec. 606, Social Security Act Amendments of 1939, c. 666, 53 Stat. 1383.) DEFINITIONS.

When used in this subchapter—

(a) *Wages*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash;

* * * * * * * * * * *

(b) *Employment* — The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * *

(d) *Employee*—The term "employee" includes an officer of a corporation.

* * * * * * * * * * * *

(26 U. S. C. 1426.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

("Federal Unemployment Tax Act")

SEC. 1600 (as amended by Sec. 608, Social Security Act Amendments of 1939, *supra*).

RATE OF TAX

Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in Section 1607(b)) paid by him during the calendar year with respect to employment (as defined in Section 1607(c)) after December 31, 1938.

(26 U. S. C. 1600.)

SEC. 1607 (as amended by Sec. 614, Social Security Act Amendments of 1939, *supra*).

DEFINITIONS.

When used in this subchapter—

* * * * * * * * * * * *

(b) *Wages*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * * * * * * * * *

(c) *Employment* — The term "employment" means any service performed prior to January 1, 1940, which was

employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, * * *

* * * * * * * * * * * *

(i) *Employee*—The term "employee" includes an officer of a corporation.

* * * * * * * * * * * *

(26 U. S. C. 1607.)

Public Law 642, 80th Congress, 2nd Sess.

Section 1.

(a) Section 1426(d) and section 1607 (i) of the Internal Revenue Code are amended by inserting before the period at the end of each the following: ", but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules".

(b) The amendments made by subsection (a) shall have the same effect as if included in the Internal Revenue Code on February 10, 1939, the date of its enactment.

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. **WHO ARE EMPLOYEES**—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for

whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no

consequence that the employee is designated as a partner, co-adventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * * * * * * * * *

The provisions of Section 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act, are substantially the same as the provisions of Section 402.204 of Treasury Regulations 106.